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Supreme Court, U.S.
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No. 99-219

In The

Supreme Court of the United States

FRANCISCA CASTILLO, GILBERT CASTILLO, AS ADMINISTRATOR OF THE ESTATE OF JESUS CASTILLO, DECEASED,

Petitioners,

v.

CITY OF ROUND ROCK, TEXAS, OFFICER MICHAEL H. KINCAIDE, (#4101), CORPORAL THOMAS C. JACOBS, (#1404) AND OFFICER SAMMY LEDESMA (#4112),

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' QUESTIONS PRESENTED RESTATED

1. Is the police practice of restraining an arrestee, face-down with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia objectively reasonable as a matter of law?

2. Is the police policy of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia constitutionally protected as a matter of law from claims of deliberate indifference to a substantial risk of severe medical harm?

3. Is the police practice of restraining an arrestee, face-down, with hands and feet cuffed (hog-tied position) and pressure applied to the back sufficient to cause death or serious bodily injury from positional asphyxia an objectively unreasonable application of deadly force contrary to the teachings of *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)?

4. Does the Court of Appeals for the Fifth Circuit ruling in *Colston v. Barnhart*, 130 F.3d 96 (5th Cir. 1997), pet. reh'g en banc denied, 146 F.3d 282 (5th Cir. 1998), cert. denied, 119 S.Ct. 618 (1999), applied here so as to allow interlocutory review of excessive force, use of deadly force, and deliberate indifference to medical needs claims where the district court denied summary judgment, findings that material fact issues regarding the actions taken by police officers existed, violate the rule in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), and the finality rule of 28 U.S.C.

PETITIONERS' QUESTIONS PRESENTED RESTATED – Continued

§ 1291 which prohibits interlocutory review of issues of law not separable from the fact determination necessary to their resolution?

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STATEMENT OF THE CASE

Respondents misrepresent the initial encounter between Officer Kincaide and Mr. Castillo, claiming that Officer Kincaide felt "threatened" by Mr. Castillo when Mr. Castillo raised his arm and drank a beer after he had first placed the 12-pack of beer on the ground pursuant to Kincaide's instruction. (Brief in Opposition, Pg. 4) By Respondents' time-line, Mr. Castillo, while still standing, stated that "someone" was "going to die", a statement that Officer Kincaide claims that he "perceived" as a "threat" (Brief in Opposition, Pg. 4) This statement conflicts with both Officer Kincaide's initial statement on how the offense occurred, as well as with statements by civilian witnesses. The first time Officer Kincaide claimed to feel threatened by Castillo was at his deposition, 16-months after the incident. (R. 775-77)[1]

Five days after the incident on January 10, 1995, Officer Kincaide provided a handwritten statement to Round Rock Police Department. (R. 649) The statement does not claim that Kincaide was threatened in any way by Mr. Castillo. Interestingly, Kincaide's handwritten statement quotes Mr. Castillo as saying, "I was going to die," apparently (attributing it as an exact quote of Mr. Castillo) Kincaide never claims that Mr. Castillo stated

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[1] Respondents' counsel was present during the deposition of his client in his office as indicated by his own submission to the District Court. (R. 775-77) The Deposition was taken May 19, 1997. Both Volumes of Officer Kincaide's deposition were reviewed by Defendants' use of force expert, Albert Rodriguez, (R. 683) as well as by Plaintiffs' expert on police practices, Dr. Peter Scharf. (R. 733-756) Both parties relied on this deposition as part of the record of this cause.

that he, Kincaide, was going to die. Kincaide cites no other contact by Mr. Castillo. (R. 649)

Respondents conveniently ignore witness Elizabeth Maya (R. 881-882) who states in a written affidavit that Mr. Castillo did not act in a threatening manner, and witnesses David Barrera (R. 718-719) and Andres Leal, Jr., both of whom gave clear accounts to Round Rock Police Department on January 5, 1995, within an hour after the incident occurred, that Mr. Castillo was held down by the officers and civilians and was shouting, "I am going to die" and "Please God, help me."[2]

The witness statements presented in the summary judgment record established that Mr. Castillo was held down by Officer Kincaide and others with great pressure exerted on his back during the struggle. (R. 713-714); (R. 718-719); (R. 721); (R. 723-724); (R. 726); (R. 730-31); and (R. 684-700).

The Respondents also contend that Mr. Castillo was rolled over onto his back within seconds of restraining his legs with flex-cuffs, however, Officer Ledesma's hand-written statement indicates that it was not seconds, but minutes, which passed before Mr. Castillo was turned over on his back. (R. 652). Mr. Castillo was not monitored

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[2] David Barrera's statement was made January 5, 1995, at 5:13 p.m. (R. 718-719) and Leal at 5:30 p.m. (R. 721) Although apparently misdated by a month, it is apparent that the Leal statement was made January 5, 1995, right after the incident and not a month later. David Barrera claims that Mr. Castillo was being held down when he stated in Spanish "Me voy a murir." Leal said Mr. Castillo said in Spanish, "It is time for me to die." (R. 718-719)

while being forced in a prone position with pressure on his back. (R. 647-48; 649, 652-53)

While Respondents are going to great lengths to discuss the timing of the events, they ignore unrefuted medical facts from Travis County Medical Examiners' and EMT records. Dr. Roberto Bayardo, M.D. states in his affidavit, "I believe that Officer Kincaide had adequate time to recognize Mr. Castillo's breathing difficulties. A person's heart will not stop beating due to lack of oxygen, unless they have gone without breathing for at least 3-4 minutes, even during a struggle." (Appendix A-38 to Petition for Certiorari) Dr. Bayardo recounts that pressure applied to Mr. Castillo's back for at least 4-6 minutes with oxygen deprivation handcuffed in a prone position, "will not only cut off oxygen, but cause the subject to struggle to get a breath, a scenario described by the various police officers and civilian witnesses." (*Id.*) Dr. Bayardo persuasively states an opinion echoed by Petitioners' police expert, Dr. Peter Scharf, that "placing an arrest suspect in such a position with pressure applied to his back for as little as 4-6 minutes, coupled with additional struggle by the suspect, is a classic example of a substantial risk of death or serious injury by positional asphyxia." (*Id.*)[3] EMT records indicate that upon arrival Mr. Castillo was still cuffed at the hands and feet while a fireman was attempting CPR. (R. 849-858) Upon arrival, the EMT personnel and Round Rock Fire Department noted Mr. Castillo had no blood

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[3] Dr. Bayardo points out that "Officer Kincaide did not attempt to investigate Mr. Castillo's medical condition and did not roll him over until after Mr. Castillo had gone into cardiac arrest." (Petitioners' Appendix A-38)

pressure, no pulse, no respiration, no heart beat, no eye response, no verbal response nor motor response, and was in full cardiac arrest. (R. 849-858)[4]

PETITIONERS' REPLY TO RESPONDENTS' REASONS FOR DENYING WRIT

I. RESPONDENTS' REASON I "RESTATED"

["The Fifth Circuit's opinion is not in conflict with any other United States Court of Appeals' decision or with any prior Fifth Circuit decision as this case does not involve "hog-tying."]

The Respondents' Brief in Opposition attempts to distinguish *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998), by drawing distinctions between the specific restraint utilized by the officers herein. This is a

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[4] Respondents claim that medical treatment was offered by the police department, but neither the EMT records, nor the officers' statements reflect same. (R. 848-859)

Once again attempting to craft the facts, Respondents mention that Mr. Castillo had an enlarged heart without pointing out Dr. Bayardo's affidavit in which the Medical Examiner states "I do not believe an enlarged heart played any role in this death." (Petitioners' Appendix A-36). Likewise Respondents state that Mr. Castillo was struggling because of a probable drug related agitated state. (R. 700), an accurate statement of the medical examiner's report following the autopsy on January 13, 1995, but fails to mention the toxicology findings dated several days later indicating no drugs of any type were found in Mr. Castillo's blood. Speculation on cause of the struggle came from police report by investigator William Avila of the Round Rock Police Department who was present at the autopsy, but not borne out by the toxicology finding. (Petitioners' Appendix A-44-51)

distinction without a difference.[5] Whether a suspect restrained behind the back and lying face down is hog-tied (by Respondents' restricted definition hands bound to feet) begs the question. "Hog-tying" is a subset of those improper restraint procedures which cause serious and substantial risk of sudden death through positional asphyxia.[6] In a recent Georgia Law Review article,[7] the author notes that "many in custody deaths around the country have been attributed to positional asphyxia." While hog-tying is discussed, it is clear that the danger of in custody deaths exists when an arrestees' arms are pulled behind his back and he is placed face down. Weight applied to the back increases the danger.

Respondents further argue that the restraint utilized, does not constitute "deadly force" as a matter of law. The

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[5] Contrary to Footnote 4 of Respondents' Brief, Petitioners would show that the report of Dr. Peter Scharf is properly part of the record. First, Dr. Scharf specifically references his report in his sworn declaration as reflected at Petitioners' Appendix A-57. Further, the District considered Dr. Scharf's report, and, an objection now raised is untimely.

[6] The U.S.D.J. through the National Institute of Justice has warned police departments across the nation about such restraint procedures and the potential for causing sudden death through positional asphyxia that occurs when, "a person lying on his stomach has trouble breathing when pressure is applied to his back." As that condition becomes more serious, the suspect struggles to get a breath resulting in increased compression to the back. *Positional Asphyxia – Sudden Death*. The National Law Enforcement Technology Center, U.S.D.J., June 1995. See reference Declaration of Peter Scharf. (R. 735-756) Affidavit of Dr. Roberto J. Bayardo, Medical Examiner of Travis County, Texas. (R. 684-732)

[7] 33 Ga. L. Rev. 281, 282 (Fall 1998)

Respondents' effort to totally disregard or minimize the competent summary judgment evidence submitted by the Petitioners in the form of the Affidavit of Travis County Medical Examiner, Dr. Roberto J. Bayardo, who performed the autopsy on Mr. Castillo and the Declaration and Report of Dr. Scharf, a police procedures and use of force expert, must fail. The Respondents' complaint that Dr. Scharf fails to comment on the degree to which banning use of the prone position would hamper effective law enforcement is not outcome determinative to whether or not the restraint against Mr. Castillo constituted "deadly force." Likewise, Respondents' complaint that Dr. Scharf does not acknowledge that Mr. Castillo was resisting arrest is without merit. Dr. Scharf specifically identifies the materials reviewed in reaching his opinions.[8]

Without restating evidence previously submitted to the Court, Petitioners would show that Respondents' statement of "Undisputed Summary Judgment Evidence" on Pg. 10 of its Response, is actually a set of conclusions favorable to the Respondents' defense. Statements that Mr. Castillo resisted arrest and that he was turned over as soon as his feet were cuffed are disputed facts.[9] Respondents attempt to analogize the facts in *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), cert.

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[8] These materials include, the depositions, police reports and Statements of Officer Kincaide, Officer Ledesma and Corporal Jacobs. It is beyond question that Dr. Scharf was aware of the officers' alleged perception at the time he rendered his sworn opinions. (R. 735-756)

[9] Ledesma states in his handwritten statement that Castillo was turned over "moments later." (R. 652)

denied, 118 S.Ct. 1052 (1998) with the instant facts, however, the amount of force utilized is different, the violent behavior of the Phillips arrestee contrasts with Castillo's actions and no monitoring was done for Castillo as was for the Phillips arrestee. *Phillips* at 592-595.

II. RESPONDENTS' REASON II "RESTATED"

["An appellate court does not violate the rule in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Behrens v. Pelletier*, 516 U.S. 299 (1996), or the finality rule of 28 U.S.C. § 1291 which prohibit interlocutory review of issues of law not separable from the fact determinations necessary to their resolution, when it determines whether a police officer's use of force meets the *Harlow* standard of "objective legal reasonableness" in an interlocutory appeal of the denial of summary judgment based on qualified immunity."]

Respondents claim that the "objective legal reasonableness" criteria for determining excessive force and qualified immunity can be distinguished. Respondents argue that regardless of facts proving the use of excessive force that an officer may still have qualified immunity if a reasonable officer *could have perceived* the actions of the arrestee as necessitating the excessive force. In its decision, the Fifth Circuit also utilized this distinction in holding that Kincaide could have perceived Castillo's actions as threatening and resisting arrest. By approaching excessive force and qualified immunity in this manner, the Fifth Circuit Court has side stepped the fact finding process and prohibited the Petitioner from presenting evidence of credibility to the fact finder. In this way, the Respondents have attempted to make the issues

in this case a "matter of law" so as to invoke the jurisdiction of the appellate court.

Other circuit courts have not recognized the distinction between the legal standard in determining excessive force and qualified immunity and have held that if fact issues exist which could result in a finding for the plaintiff on the excessive force issue or the jury has rendered a finding for the plaintiff on the excessive force issue, then the officer is deprived of qualified immunity. The cases in disagreement with the Fifth Circuit include *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991), *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996), *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995), *Roa v. Inhabitants of Lewiston*, 42 F.3d 691 (1st Cir. 1994),*Wardlaw v. Pickett*, 1 F.3d 1297 (D.C. Cir. 1993), and *Jackson v. Hoylman*, 933 F.3d 401 (6th Cir. 1991). In these circuits, a determination of unreasonable force precludes a favorable finding on qualified immunity because the test for each is identical.

Petitioners would show that the standard for determining excessive force and the officer's entitlement to qualified immunity is the same, and, therefore, factual issues in this case are inseparable from Petitioners' cause of action. Therefore, the Appellate court did not have jurisdiction over this case because it fails to satisfy the finality rule of 28 U.S.C. § 1291 and violates the holdings in *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299 (1996).

CONCLUSION

For the reasons set forth in Petitioners' Petition for Writ of Certiorari, and this Reply Brief, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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